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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN CARL FAULKNER,

Defendant and Appellant.

G041313

(Super. Ct. No. BLF004142)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,
Graham Anderson Cribbs, Judge. Reversed in part and affirmed in part and remanded
with directions.

David McNeil Morse, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck
and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Kevin Carl Faulkner of 31 of the 34 counts alleged against him. Defendant raped, sodomized, orally copulated, and committed lewd and lascivious acts upon a series of girls who were the daughters or granddaughters of women defendant successively dated and/or married. The court sentenced defendant to 316 years and eight months to life in prison.

Defendant raises four issues on appeal: (1) whether the court violated his due process rights by suspending the trial for 37 calendar days (19 court days) to meet the needs of several jurors and avoid a mistrial; (2) whether the court prejudicially erred by failing to instruct the jury on the applicable statute of limitations for counts 1 through 22; (3) whether defendant's right to conflict-free counsel was violated by a pending criminal investigation of the defense investigator; and (4) whether the court erred when it denied defendant's motion for a continuance to substitute retained counsel prior to sentencing. We reverse defendant's conviction on count 9,¹ but otherwise affirm.

FACTS

The nature of this appeal permits us to avoid recounting the sordid details of defendant's offenses and the tragic effects of those offenses on the lives of the victims. It is sufficient to observe that, over the course of several decades, defendant sexually abused children entrusted to his care and maintained secrecy through violence and threats. We will set forth below only those facts necessary to a review of the issues raised in this appeal.

¹ The People concede that defendant is correct in challenging his conviction on count 9, as this count was intended to represent a lesser included offense of count 8. "If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Moran* (1970) 1 Cal.3d 755, 763.)

DISCUSSION

Suspension of Trial for 37 Days (or, Alternately, 19 Court Days)

Defendant leads off with the argument that his due process rights were violated by a lengthy suspension of the trial. The parties selected a jury from January 16 to February 6, 2007. The time estimate for the conclusion of trial provided jointly by the attorneys was April 19. An unexpected delay to address a conflict issue occurred; opening statements and the presentation of testimony commenced on February 26. The case then proceeded unabated for more than three months.

On May 31, 2007, the court received notes from two of the sitting jurors and one alternate stating they were each scheduled to begin teaching a summer school session on June 18 and it would be a financial hardship if they were unable to take advantage of this opportunity. The court noted, “If these three are cut loose, that takes us down to 11 and we end up with a mistrial.”

Each of the jurors was questioned. One stated it was an absolute economic necessity to receive the income from summer school to pay her bills during the two months for which she did not receive a regular teaching salary. Another stated she was planning to use her summer school income to pay for travel to see her family. The alternate juror stated she needed the summer income because she had already “dipped into” her savings needed to get through the summer months.

Subsequent to this questioning, a fourth juror sent a note to the court describing a scheduled one-month vacation beginning June 22 to attend a large family reunion at which he would visit his cancer-stricken mother. The next day, the court learned a fifth juror was experiencing difficulties with her pregnancy; she was later excused from service on June 7.

On June 12, over objection by defendant, the court ordered the trial adjourned from June 15 to July 23. The court described the basis for its decision: the

jury was down to 12 members and one alternate; excusing those with justifications would result in a mistrial; the trial had already gone 60 days beyond the parties' estimate; an estimated 340 jurors were examined by the attorneys before the jury was selected; the People and defendant (since beginning his case in chief on April 16) each called approximately 20 witnesses; virtually all of the witnesses lived in Blythe, a 200 mile round trip from the Indio branch of the Riverside County Superior Court at which the case was being tried; the jurors made the requests for reasons of financial necessity and longstanding vacation plans (which included a visit with the juror's mother who was terminally ill with cancer) and any adjournment would be for the jury's convenience (not the convenience of the court or the parties); and defendant would not stipulate to finish the trial with less than the full complement of 12 jurors.

Courts have discretion under Penal Code sections 1050 and 1121² to grant or deny continuances during trial. “The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.” (*People v. Zapien* (1993) 4 Cal.4th 929, 972.)

This discretion extends to circumstances in which the continuance is provided for the sake of the jury's convenience. In *People v. Bolden* (2002) 29 Cal.4th 515, 561-562, our Supreme Court found no abuse of discretion by the trial court in its interruption of jury deliberations for 13 calendar days (four regularly scheduled court days) over the December holidays for the convenience of the jurors.

Defendant argues even broad discretion does not justify a 37 calendar day (19 court day) continuance. Defendant cites several cases, none of which ultimately

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All statutory references are to the Penal Code.

support the conclusion that the court erred in this case. (See *People v. Santamaria* (1991) 229 Cal.App.3d 269 (*Santamaria*); *People v. Engleman* (1981) 116 Cal.App.3d Supp. 14 (*Engleman*); *U.S. v. Hay* (9th Cir. 1997) 122 F.3d 1233 (*Hay*).)

In *Santamaria*, the jury was two days into deliberations (15 days into trial) when the court adjourned for 11 days. (*Santamaria, supra*, 229 Cal.App.3d at pp. 274-275.) This continuance occurred only because the trial judge was “away” during the week of the continuance. (*Id.* at pp. 275, 277.) The *Santamaria* court observed: “This absence of good cause is not our only concern; both the timing and duration of the continuance are particularly troublesome. A long adjournment of deliberations risks prejudice to the defendant both from the possibility that jurors might discuss the case with outsiders at this critical point in the proceedings, and from the possibility that their recollections of the evidence, the arguments, and the court’s instructions may become dulled or confused.” (*Id.* at pp. 277-278.) There was a viable alternative to adjournment in *Santamaria*, namely using a substitute judge while the trial judge was away. (*Id.* at p. 278.) The court concluded the abuse of discretion required reversal of the judgment. (*Id.* at p. 281.)

In *Engleman*, the appellate division of the Los Angeles Superior Court reversed a judgment of conviction in part because the trial judge continued the trial for three weeks (after the People rested) so he could fulfill a temporary assignment in another court. (*Engleman, supra*, 116 Cal.App.3d Supp. at pp. 20-21.)

In *Hay*, the trial court granted a 48 day continuance to accommodate juror vacations when the trial unexpectedly extended into summertime after beginning in February. (*Hay, supra*, 122 F.3d at pp. 1234-1235.) Prior to the continuance, the defendant offered to proceed with only 11 jurors to avoid a lengthy recess. (*Id.* at p. 1235.) The court rejected this offer, even though closing arguments and deliberations were the only remaining components of the trial. (*Ibid.*) On the grounds that a 48 day

“separation during a criminal trial is unprecedented,” the court found prejudicial error. (*Id.* at p. 1236.)

None of these cases necessitate a finding that the court in the case before us abused its discretion. Here, the continuance was long, but not outrageously so in comparison with the overall length of the trial (which did not conclude until the end of September). The jury already had to remember the presentation of evidence and argument over the course of many months and had additional evidence left to hear when the continuance was granted. Juror deliberations were not interrupted. The continuance here occurred while defendant was still putting on his case in chief. (See *Santamaria*, *supra*, 229 Cal.App.3d at p. 282 [“Had the adjournment occurred in midtrial, counsels’ recapitulation of the evidence during argument might have nullified or minimized the effect of the delay on the jurors’ recall”].) Finally, there was no viable alternative to a continuance in this case, other than a mistrial, which would have wasted the enormous efforts already devoted to the trial and would not necessarily have resulted in a better trial.

In sum, the totality of the circumstances in this case supports a conclusion that a 37 day continuance was reasonable. There is no bright line maximum number of midtrial continuance days. (Cf. *People v. Gray* (2005) 37 Cal.4th 168, 225-231 [338 day delay between guilt and penalty phases did not violate defendant’s constitutional rights].) The court carefully examined all alternatives, offered defendant the chance to stipulate to a smaller jury, and ultimately concluded justice would comport with a continuance rather than a mistrial. Defendant’s right to due process was not violated.

Statute of Limitations

Defendant next claims the court erred by not instructing the jury on the applicable statute of limitations for counts 1 through 22, which involve allegations defendant committed various offenses (i.e., lewd and lascivious acts, rape, oral copulation

by force, sodomy) against two girls from 1990 to 2000. The jury convicted defendant of all of the first 22 counts in the operative information.³

The standard statute of limitations is six years for offenses (such as those at issue in counts 1 through 22) punishable by imprisonment for eight or more years.

(§ 800.) For counts 1 through 22, such period had run by October 2006 when the case “commenced.” (See § 804.) Defendant contends the only way to extend the statute of limitations beyond six years is to invoke section 803, subdivision (f).⁴

As an initial matter, it is not clear that all of the first 22 counts are subject to a six year statute of limitations. This case commenced on October 25, 2006, which appears to be within 10 years of the commission of the conduct charged in counts 8, 10, 11, 12, 13, 14, 15, and 22. Section 801.1, subdivision (b), (and its prior versions, which were codified elsewhere) extends the statute of limitations to 10 years for crimes listed in section 290, subdivision (c), including the crimes in counts 8, 10, 11, 12, 13, 14, 15, and 22. (See *In re White* (2008) 163 Cal.App.4th 1576, 1583 [“The 10-year statute of limitations applicable to the [sex] crimes of which [defendant] was convicted was continuously in effect from January 1, 2001. The six-year statute of limitations in section 800 did not expire until [after January 1, 2001]. His prosecution was never time-barred”].)⁵

³ As already noted, we agree with the parties that count 9 must be reversed. For ease of reference, we will continue to refer to counts 1 through 22 in this section even though count 9 is no longer pertinent to the analysis.

⁴ Section 803, subdivision (f), was previously codified as subdivision (g) and is referred to as section 803, subdivision (g), in several cases discussed in this section. We will nonetheless refer to the current statute because the changes that have been made to the statute do not affect the issues in this case.

⁵ Section 801.1, subdivision (a), authorizes commencement of prosecution of certain sexual offenses against victims under the age of 18 to occur “any time prior to the victim’s 28th birthday.” This statute was passed in 2005 and was therefore in effect on January 1, 2006, prior to the commencement of the action against defendant. Moreover,

Nevertheless, the majority of the conduct alleged in counts 1 through 22 occurred more than 10 years before the commencement of this action. Thus, for most of these counts, defendant rightly claims section 803, subdivision (f), must be satisfied to extend the applicable statute of limitations. Neither of the parties discuss section 801.1 in their briefs. We will therefore analyze all of the counts at issue under section 803, subdivision (f).

Section 803, subdivision (f)(1), states: “Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of [certain sexual crimes].” Thus, this law extends the applicable statute of limitations for specified crimes, so long as the crimes “were not time-barred on January 1, 1994” (*People v. Vasquez* (2004) 118 Cal.App.4th 501, 504; compare *Stogner v. California*, *supra*, 539 U.S. 607 [holding this statute to be an unconstitutional ex post facto law insofar as it purports to revive previously expired limitations periods].)

Section 803, subdivision (f), “applies only if all of the following occur: [¶] (A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired. [¶] (B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual. [¶] (C) There is independent evidence that corroborates the victim’s allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim’s allegation.” (§ 803, subd. (f)(2).) “No

the two victims of counts 1 through 22 were not yet 28 at the time of the commencement of this action. However, unless the statute of limitations had been extended by some other statute through January 1, 2006, the application of section 801.1 against defendant would appear to constitute an unconstitutional ex post facto law under *Stogner v. California* (2003) 539 U.S. 607.

evidence may be used to corroborate the victim’s allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.” (§ 803, subd. (f)(3).)

Defendant concedes that, “provided the evidence supported each of its requirements, section 803 functioned to extend the statute of limitations for the offenses charged in counts 1 through 22, all of which were not yet time barred in 1994.” But defendant contends the court failed to ask the jury to make the factual findings triggering the applicability of section 803, subdivision (f).

No instructions which pertain to the statute of limitations were provided to the jury. The court rejected defendant’s request to submit CALCRIM No. 3410, which defendant now admits does not apply to this case.⁶ Defendant also raised certain other legal issues pertaining to the statute of limitations earlier in the case. But the argument defendant makes on appeal — i.e., the court needed to fashion an instruction to the jury on the factual questions built into section 803, subdivision (f) — was not explicitly made below at any time.

The jury was instructed with CALCRIM No. 301: “The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.” This is an accurate instruction in general, but with regard to counts 1 through 22 there is a predicate requirement that there exist independent corroborating evidence for the statute of limitations extension to apply. (§ 803, subd. (f)(2)(C).)

⁶ The modified version of CALCRIM No. 3410 submitted by defendant stated: “Defendant may not be convicted counts I-XXII, unless the prosecution began within six years of the dates the crime was committed. The present prosecution began on August 30, 2006; [¶] The People have the burden of proving by a preponderance of the evidence that prosecution of this case began within the required time. This is a different standard of proof than proof beyond a reasonable doubt. . . . If the People have not met this burden, you must find the defendant not guilty of counts I-XXII.”

Defendant claims there is a sua sponte duty for the court to instruct the jury on a statute of limitations defense. (See *People v. Stewart* (1976) 16 Cal.3d 133, 140 [included within the court’s duty to instruct the jury on general principles of law relevant to the case is the duty to instruct on defenses supported by substantial evidence].) “[A]t trial the prosecution bears the burden of proving that the charged offense was committed within the applicable period of limitations. [Citation.] The burden of proof on this issue is proof by a preponderance of the evidence.” (*People v. Lopez* (1997) 52 Cal.App.4th 233, 248.) Defendant also points to *People v. Ruiloba* (2005) 131 Cal.App.4th 674, 681-682 (*Ruiloba*) as an illustration of how the jury should have been instructed with regard to the statute of limitations issue in the instant case.

Citing *People v. Castillo* (2008) 168 Cal.App.4th 364 (*Castillo*), the People respond that there was no duty in this case to instruct the jury on the statute of limitations. *Castillo* explained that issues of law raised by a statute of limitations (such as ex post facto issues or when an action has “commenced” for purposes of applying the statute) should be resolved by the judge, not the jury. (*Id.* at p. 375.) Defendant raised only legal issues in the trial court, which were rightly decided by the court and not submitted to the jury. As far as this argument goes, we agree. The trial court should not have submitted legal questions to the jury for its consideration.

But this observation does not fully answer the contention of defendant on appeal, that the court had a sua sponte duty to instruct the jury on the factual questions raised by section 803, subdivision (f). There are six questions that must be answered affirmatively to extend the statute of limitations under section 803, subdivision (f): (1) the “criminal complaint [was] filed within one year of the date of a report to a California law enforcement agency”; (2) the victim was under 18 when the relevant conduct occurred; (3) the crime at issue falls within section 261, 286, 288, 288a, 288.5, 289, or 289.5; (4) the ordinary limitation period has expired; (5) “[t]he crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding

masturbation that is not mutual”; and (6) “[t]here is independent evidence that corroborates the victim’s allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim’s allegation.”

It is unclear whether a court errs by not instructing the jury under section 803, subdivision (f), in the absence of a request to provide an appropriate instruction. Clearly, it is proper to instruct a jury to make factual findings under section 803, subdivision (f). (See *People v. Riskin* (2006) 143 Cal.App.4th 234, 238-240; *People v. Linder* (2006) 139 Cal.App.4th 75, 81; *Ruiloba, supra*, 131 Cal.App.4th at pp. 681-682; *People v. Mabini* (2001) 92 Cal.App.4th 654, 657-658 (*Mabini*).) Conversely, it has been held a defendant can forfeit the right to have the jury instructed on section 803, subdivision (f). (*People v. Thomas* (2007) 146 Cal.App.4th 1278, 1281-1282 (*Thomas*).) Here, defendant never requested an appropriate statute of limitations instruction. But he did repeatedly raise statute of limitations issues, and the People do not claim this issue has been forfeited. If there is a sua sponte duty to instruct on section 803, subdivision (f), the court erred.

Regardless of whether instructional error occurred, defendant’s convictions must be affirmed if the court’s alleged error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Thomas, supra*, 146 Cal.App.4th at pp. 1289-1291.) Under *Watson*, we examine the “entire cause, including the evidence” and determine whether it is “‘reasonably probable’ defendant would have obtained a ‘more favorable’ outcome had the instructional error not occurred.” (*People v. Moya* (2009) 47 Cal.4th 537, 541.)

Defendant focuses on the court’s failure to instruct the jury on the sixth question listed above — that of “corroboration of the victim’s allegation” — to illustrate prejudice. Defendant does not contend he was harmed by the lack of an instruction on the other section 803, subdivision (f) questions.

Evidence of similar sexual misconduct against an uncharged victim, standing alone, can constitute sufficient corroboration for purposes of section 803, subdivision (f)(2)(C). (*Mabini, supra*, 92 Cal.App.4th at p. 659; see also *Ruiloba, supra*, 131 Cal.App.4th at p. 683 [“Evidence of a person’s propensity to do what the victim has alleged corroborates the victim’s allegation. . . . Further, the corroboration does not have to be sufficient to support a *conviction*”].) Here, the prosecutor introduced evidence of uncharged sexual conduct involving defendant and three additional girls who lived with defendant, and evidence of rebuffed sexual advances made by defendant to a 17-year-old girl who was a daughter of a friend of defendant. Three of these girls were under defendant’s care as a father figure.

Even putting aside the uncharged conduct, there is overwhelming corroborating evidence of similar sexual misconduct by defendant. The jury convicted defendant beyond a reasonable doubt with regard to two victims whose testimony did not require corroboration. (See *Thomas, supra*, 146 Cal.App.4th at p. 1290 [“The critical corroboration is the evidence that defendant committed sexual offenses against the three other victims. The jury found true beyond a reasonable doubt that [three others] were victims of defendant’s sexual misconduct”].) Counts 23 through 33 pertained to acts (such as rape, lewd and lascivious acts, and certain non-sexual violence) allegedly committed against a third girl in 2005 and 2006. The jury convicted defendant of all of these counts except counts 25 and 32. In count 34, defendant was charged with lewd and lascivious acts between 2001 and 2003 upon a fourth girl under section 288.5; the jury found defendant guilty of the lesser included offense of lewd and lascivious acts on a child under 14 under section 288, subdivision (a). All of the victims in this case were girls for whom defendant bore parental or supervisory responsibility. Defendant utilized similar tactics in abusing his victims: wait for an opportunity when he was alone with the victim, force the victim to comply with his demands through physical force and/or threats, and maintain the victims’ silence through additional violence or threats.

In sum, the court's instructional error was harmless because it is not reasonably probable defendant would have obtained a better outcome had the court properly instructed the jury. (*Thomas, supra*, 146 Cal.App.4th at p. 1291 [finding any error in failing to instruct the jury regarding section 803, subdivision (f), was not prejudicial].) We agree with the trial court's observation that "the evidence in this case was overwhelming, overwhelming, overwhelming with regard to what I presided over for approximately . . . eight months of trial to a point that no other conclusion could have been reached but the verdict that was returned by the jury in this case."

Defense Counsel's Alleged Conflict of Interest

Defendant also claims his right to effective assistance of counsel was violated by the court's refusal to grant a motion for mistrial after the discovery of a purported conflict of interest between defendant and his trial counsel.

Near the end of the trial, on August 30, 2007, the prosecutor requested that the court bar further unsupervised contact between the defense team and one of the victims. According to the prosecutor, the defense investigator had offered to provide the victim's boyfriend a free attorney in an unrelated matter in exchange for the victim recanting her testimony against defendant. The prosecutor said there was a pending criminal investigation into these alleged events. The court denied the prosecutor's motion. Defense counsel, to no avail, demanded to see the police report from which the prosecutor was reading. Instead, the court took a copy of the report from the prosecutor and ordered the report sealed. Defense counsel complained the prosecutor was attempting "to drive a wedge between me and my staff in my representation of Mr. Faulkner with this specious baloney that emanates from a couple of hotheads."

Defendant, the last witness called for the defense, completed his testimony on direct examination on September 7, 2007. On September 10, defense counsel indicated to the court that he now thought he was under a conflict of interest because of

the investigation into the defense investigator's alleged conduct. This contention was made despite the prosecutor's representation that only the defense investigator (and not defense counsel) was under investigation. Defense counsel explained in camera that he thought the investigation could potentially implicate defense counsel because the investigator was performing his job at defense counsel's request. Thus, according to defense counsel, he would be operating under a conflict of interest if he continued to represent defendant because of the lurking danger he could be prosecuted in connection with his representation of defendant.

After hearing from all parties, the court ruled: "The issue with regard to [the victim and her boyfriend], in my humble opinion . . . is a red herring and offers nothing more than further delay in getting this trial brought to a conclusion." The court found there was not a conflict. The trial continued and was completed soon thereafter.

Defense counsel in a criminal case owes a duty of loyalty to the defendant, including a duty to avoid conflicts of interest. (*People v. Doolin* (2009) 45 Cal.4th 390, 411.) A criminal defendant's constitutional right to the assistance of counsel "includes the correlative right to representation free from any conflict of interest that undermines counsel's loyalty to his or her client." (*Id.* at p. 417.)

Defendant is correct in asserting the prosecutor created a potential conflict of interest when she informed the court (and defense counsel) that a criminal investigation into the defense investigator had been initiated. (See *In re Gay* (1998) 19 Cal.4th 771, 832-833 (conc. opn. of Werdegarr, J.) [pending criminal and state bar investigations created conflict of interest between defense counsel and client]; *Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1168, 1170 [on federal habeas review, noting the view that conflict of interest existed when defense counsel is being prosecuted for crime at the same time by the same district attorney's office as her client].) Defense counsel considered his position to be precarious because his vigorous representation of defendant could potentially lead to criminal charges against him. The prosecutor failed in her effort

to unring this bell by claiming only the defense investigator and not defense counsel were under investigation. Under the circumstances, defense counsel had a reasonable fear he could ultimately be implicated if any criminal charges were brought in connection with the defense investigator's actions.

But neither state nor federal law require reversal of a judgment on the bare finding of a potential conflict between the interests of defendant and defense counsel. The record must demonstrate “that defense counsel labored under an actual conflict of interest ‘*that affected counsel’s performance*’ — as opposed to a mere theoretical division of loyalties.” (*Doolin, supra*, 45 Cal.4th pp. 417-421 [same standard applicable to claims under both state and federal constitutions].) “[A] determination of whether counsel’s performance was ‘adversely affected’ . . . ‘requires an inquiry into whether counsel “pulled his punches,” i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict.’” (*Id.* at p. 418.)

Defendant does not identify in his brief any adverse effect arising out of the alleged conflict of interest. Defense counsel expressed his opinion that a conflict existed and he did not wish to continue with the case, but he simultaneously told the court it was his “personal view that [he was] strong enough to work through that fear and to argue vigorously for the benefit of my client despite that fear” A review of the record confirms counsel’s view, as he continued to zealously fight for defendant’s interests until the end of the case. Defendant claims counsel, but for the conflict, would and should have continued an investigation into the possibility of the victim recanting her testimony. Although there is some indication that the victim’s boyfriend might have been trying to convince the victim to change her testimony to advance his own interests, there is no indication in the record that the victim had any intention of recanting her testimony.

Refusal of Court to Allow Substitution of Defense Counsel at Sentencing

Finally, defendant claims the court abused its discretion by denying his motion for a continuance so he could substitute counsel prior to sentencing. The jury returned its verdicts on September 28, 2007. The court set sentencing for October 19. On October 16, defendant orally requested that the court relieve defense counsel of his representation of defendant, continue the matter for 60 days to allow retention of new counsel, and appoint the public defender to represent defendant in the interim. The prosecutor objected on the grounds that defendant had selected this sentencing date and the victims had arranged their schedule around appearing for sentencing in October. The court declined to grant defendant's motion. Because of the delay caused by the court's consideration of this motion, sentencing proceeded on October 24 with defendant's retained trial counsel continuing to represent him.

Defendant primarily relies on *People v. Trapps* (1984) 158 Cal.App.3d 265 (*Trapps*) in asserting error. The *Trapps* court held a trial court abuses its discretion when it does not grant a reasonable continuance to allow a defendant to retain new counsel to represent him at sentencing. (*Id.* at pp. 270-272.) The *Trapps* court explained: "A reasonable continuance would not have disrupted the orderly administration of justice. This was a sentencing, not a trial. The sentencing which took place was not a lengthy proceeding and no witnesses were called. It had already been delayed three months, and appropriately so, to enable the Department of Corrections to do a diagnostic study of Trapps. Trapps had other charges still pending in the same court. When Trapps moved to continue his sentencing, he had just returned from the study and was not unjustifiably dilatory in his request." (*Id.* at pp. 271-272.)

There are certainly some similarities between the instant case and *Trapp*. Defendant sought to replace retained counsel. And the proceedings were at the sentencing stage in both cases. But there are substantial differences as well. Defendant unreasonably delayed bringing the motion until three days before the date he selected for

sentencing. Witnesses were scheduled to appear at defendant's sentencing hearing. Defendant had no additional charges pending in the court. The record in this case supports an inference defendant sought delay for its own sake, rather than to vindicate his right to counsel of his choice based on a sincere loss in faith in defense counsel and desire to retain new counsel. Under the circumstances presented, the court did not abuse its discretion. (See *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850-851 [lack of timeliness and adverse effect on the orderly administration of justice support court's denial of motion for continuance to obtain retained counsel].)

DISPOSITION

Defendant's conviction on count 9 is reversed and the matter is remanded to the trial court with directions to dismiss count 9 and vacate the 15-years-to-life sentence imposed on that count. The remainder to the judgment is affirmed, resulting in a new aggregate sentence of 301 years and eight months to life.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.